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No. 103

In the Supreme Court of the United States

OCTOBER TERM, 1930

HARRY F. WAITE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition in this case.

OPINION BELOW

The opinion of the Court of Claims (R. 22) holding that an infringement of petitioner's patent had been committed is reported in 63 C. Cls. 438. The court's memorandum as to damages (R. 31) and its decision refusing to allow interest (R. 33) have not been reported.

JURISDICTION

The judgment sought to be reviewed was entered on February 10, 1930. (R. 33.) A motion for new

trial was overruled on April 7, 1930. (R. 33.) The petition for certiorari was filed on May 7, 1930. (R. 33.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION

The question involved is whether, in determining the "reasonable and entire compensation" which the Act of July 1, 1918, c. 114, 40 Stat. 704 (Appendix, pp. 5–6), provides that a patent owner may recover from the United States for the use by it of his invention, the Court of Claims should include interest on the amount awarded from the date when the use of the invention commenced to the date of judgment. The Court of Claims refused to allow interest in this case. (R. 33.)

STATEMENT

In 1920 letters patent were issued to the petitioner upon a transformer for the production of suitable currents for the operation of a Coolidge X-ray tube. (R. 10, 29.) In 1917 and 1918 the petitioner's company had sold to the United States transformers at a profit of $59.42 per transformer. (R. 29, 30.) In 1921 and 1922 the Wappler Electric Company sold one hundred and one similar transformers to the United States. (R. 28.) In a decision rendered May 2, 1927, the Court of Claims held that the use of these transformers by the United States was an infringement of the peti-

tioner's patents. (R. 22.) After further submission of the case as to the amount recoverable, the Court of Claims gave judgment for the petitioner for $6,001.42, representing the estimated profits of $59.42 per transformer lost by the petitioner because of the use by the United States of the Wappler transformers. (R. 32.) On April 7, 1930, the Court of Claims entered an order overruling a motion for new trial and refusing to award interest. (R. 33.)

DISCUSSION

If the phrase "reasonable and entire compensation," as used in the Act of 1918, has the same meaning as the phrase "just compensation," as used in the Fifth Amendment of the Constitution, it would seem that the court should have allowed interest. (See *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Liggett & Myers* v. *United States,* 274 U. S. 215; *Phelps* v. *United States,* 274 U. S. 341.) If the phrase in question does not have that meaning, it would seem that the court was right in refusing interest because of Section 177 of the Judicial Code, which provides that "no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." (See *United States* v. *North American Co.,* 253 U. S. 330.) We submit that the

question is one which should be settled by this Court, as it is involved in a number of important cases which are now pending.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
BRADLEY B. GILMAN,
PERCY M. COX,
W. MARVIN SMITH,
Attorneys.

SEPTEMBER, 1930.

APPENDIX

The Act of July 1, 1918, c. 114, 40 Stat. 704, 705, amending the Act of June 25, 1910, c. 423, 36 Stat. 851 (U. S. C., Title 35, Sec. 68) provides in part as follows:

> The Act entitled "An Act to provide additional protection for the owners of patents of the United States, and for other purposes," approved June twenty-fifth, nineteen hundred and ten, shall be, and the same is hereby, amended to read as follows, namely:
>
> "That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however,* That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the

possession of the United States: *Provided further,* That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further,* That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service."

U. S. GOVERNMENT PRINTING OFFICE: 1930